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Arizona Corporation Commission
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IN THE MATTER OF INVESTIGATION INTO QWEST CORPORATION'S COMPLIANCE WITH CERTAIN WHOLESALE PRICING REQUIREMENTS FOR UNBUNDLED NETWORK ELEMENTS AND RESALE DISCOUNTS

DOCKET No. T-00000A-00-0194
Phase IIA

QWEST CORPORATION'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE PORTIONS OF THE DIRECT TESTIMONY OF AT&T WITNESS, DOUGLAS DENNEY, AND MOUNTAIN TELECOMMUNICATIONS WITNESS, MICHAEL LEE HAZEL

In their opposition to Qwest's motion to strike portions of the direct testimony of Douglas Denney and Michael Lee Hazel, AT&T and MCI argue that Qwest's motion is premised upon "procedural gamesmanship" and "misrepresentations." This rhetoric is as inaccurate as it is unnecessary.

Qwest's motion is expressly based on the stipulation that AT&T entered into with the other parties on April 8, 2003, to define with clarity the issues that will be addressed in this phase of the cost docket. The only issues the parties agreed to address and that are listed in the Procedural Order of April 11, 2003, concern the appropriate rates for transport and the analog switch port. There is no reference at all in either the stipulation or the Procedural Order to revisiting the rate for the unbundled loop. That is why, in their response, AT&T and MCI ignore the plain terms of the stipulation and the Order, barely mentioning these controlling documents. But the stipulation and Order establish that issues relating to the unbundled loop are beyond the

scope of this proceeding. As Staff witness, William Dunkel, put it in his rebuttal testimony,

> The UNE loop rates were previously set, and there is no reason to revisit them now. The April 11, 2003 Procedural Order which established this proceeding makes no reference to addressing the UNE loop rates in this proceeding.[1]

It is ironic that AT&T and MCI accuse Qwest of "gamesmanship" while it is they who violate the stipulation and Procedural Order by attempting to raise issues no one intended to include in this proceeding. If AT&T and MCI believed that the loop rate should be revisited, they should have raised this issue during the detailed discussions that led to the stipulation and the prehearing conference that preceded the Procedural Order. They did not and, instead, elected to present the issue for the first time, without any notice, by including it in Mr. Denney's direct testimony. It is hardly "gamesmanship" for Qwest to file a motion that seeks to prevent AT&T and MCI from breaking the agreement the parties struck when they entered into the stipulation.

Equally baseless is AT&T's and MCI's claim that Qwest's opposition to including the loop rate in the proceeding reflects an inconsistency in Qwest's advocacy – that Qwest supports strict adherence to the HAI results only when rates increase. If the loop rate were included in this proceeding, strict application of the HAI model actually could produce a rate higher than the rate of $11.99 set forth in Mr. Denney's testimony. As AT&T and MCI are no doubt aware, if the Commission adopts Staff option 1 relating to transport and thereby sets transport rates substantially below the rates calculated by HAI, that will require transferring to the unbundled loop network expenses and other overhead expenses that HAI currently assigns to transport. The end result is that the loop rate would exceed the rate Mr. Denney is now advocating, and there also would be a small increase in the port rate that HAI produces. It would be interesting, and probative of their motive, to know if AT&T and MCI endorse this transfer of expenses to the loop and the port and the rate increases that would result.

This effect of Staff option 1 on the loop rate demonstrates the wisdom of limiting the

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[1] Rebuttal Testimony of William Dunkel at 10, lines 4-6.

issues to be addressed in this expedited phase of the proceeding. If the loop rates were revisited to account for adjustments to the switching and transport rates, this proceeding would become more complex and time-consuming, which would defeat the goal of having an "expedited" proceeding. In another gratuitous, inaccurate shot at Qwest, AT&T and MCI assert that Qwest is responsible for the expedited nature of the proceeding, apparently suggesting that if the proceeding were not expedited, issues relating to the loop could easily be addressed. However, the proceeding is expedited because of the claim of MTI that it needed immediate relief from the transport rates the Commission ordered in the cost docket, a claim that MTI asserted through a motion for a preliminary injunction. The parties, including AT&T, agreed to an expedited hearing, in part, to address the immediate resolution that MTI was seeking. Thus, the stipulation provides that the parties "stipulate and agree that the Hearing Division should hold an expedited hearing on the following, limited issues . . . ." (emphasis added). It is disingenuous of AT&T, as a signatory to the stipulation, to fault Qwest for this timing of the hearing.

AT&T and MCI also suggest that they could not have raised the loop-related issue any earlier because they had no reason to know of the effect of the Phase IIA switching rulings on the loop rates. This claim also is incorrect. In its January 11, 2003 compliance filing, Qwest listed a port rate of $2.44, reflecting the fact that, using the inputs the Commission ordered, the HAI model produces a higher rate than the $1.61 the Commission ordered. In that filing, Qwest made it clear that there was disagreement among the parties concerning the appropriate port rate: "A dispute remains between the parties with respect to Sections 9.11.1 and 9.11.2 regarding recurring rates for Analog Line Side Port for the first port and each additional port." Qwest raised this issue at the procedural conference on January 27, 2003, and AT&T acknowledged during the conference that HAI does produce a port rate of $2.44 using the Commission's inputs.[2] In its

[2] Procedural Conference Transcript, January 27, 2003 at 12. AT&T's acknowledgment of the accuracy of the $2.44 rate also establishes that AT&T was certainly aware that assigning all switching costs to the port, as AT&T now advocates, produces a port rate of $4.06.

motion to reopen the record, filed February 11, 2003, Qwest again demonstrated the accuracy of the $2.44 rate.

As this history demonstrates, AT&T and MCI knew at least three months before they filed their direct testimony on April 28, 2003, that HAI produces a higher port rate than the Commission ordered. Thus, they had at least three months to raise their claim that the loop rate should be adjusted to account for the higher port rate. They could have done so in response to Qwest's compliance filing, at the procedural conference on January 27, 2003, in response to Qwest's motion to reopen the record, and during the discussions that produced the stipulation and the Procedural Order. While there is merit to AT&T's and MCI's statement that this issue had not been expressly identified when the ALJs and the Commission issued their Phase IIA orders, there is no basis for their claim that they acted timely by first raising the issue in Mr. Denney's testimony of April 28.

Finally, having waited more than three months to raise this issue, AT&T and MCI assert that Qwest acted untimely by bringing the motion to strike two weeks after the filing of Mr. Denney's April 28 testimony. They argue, therefore, that Qwest should not be permitted to submit additional testimony on the loop issues if the motion to strike is denied. There is no fixed time requirement for a motion of this type, however, and two weeks plainly is not an unreasonable period. In addition, denying Qwest the right to submit testimony on the loop rate if the motion is denied would improperly reward AT&T and MCI for their delay in raising the issue. If the Commission does not strike Mr. Denney's loop testimony, the reasonable, fair approach would be to allow Qwest to respond to the testimony orally at the hearing and to allow Mr. Denney a brief oral reply.

For the reasons stated here and in Qwest's motion, Qwest respectfully requests that the Commission grant its motion to strike.

RESPECTFULLY SUBMITTED this 22nd day of May, 2003.

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